UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GEORGE G. HARRIS T/A WILDLIFE COLLECTION,	)	
Plaintiff,	)	
v.	)	No. 4:97-CV-01604 (ERW)
PAT WROB, et al.,	)	
Defendants.	)	

DEFENDANTS' INITIAL RESPONSE TO ORDER TO SHOW CAUSE

Defendants Pat Wrob and Rocking P, Inc. d/b/a River's Edge Products, respectfully submit this initial response to the Court's Order to Show Cause why they should not be held in contempt (Doc. 40).

Request for Opportunity to Submit Additional Materials

This dispute arises out of a Consent Judgment entered more than 13 years ago. Defendant Wrob, on behalf of these Defendants, retained counsel last Friday and has diligently attempted to gather the relevant documents in order to respond within the Court's deadline. He submits herewith his Declaration with various exhibits, some dating back more than 13 years. However, he is continuing to gather documents and investigate the matters at issue, and thus respectfully requests the opportunity to supplement today's submissions within a reasonable time to the extent the Court or Plaintiff may have concerns or questions not adequately addressed by this submission.

Statement of Pertinent Facts

As set forth in Mr. Wrob's Declaration and the Exhibits thereto, the basic facts are as follows:

By the time of entry of the Consent Judgment in May of 1998, (a) Mr. Wrob's company had hired a wildlife artist to create original new artwork to replace the artwork in dispute in the Lawsuit, (b) his company had registered the copyrights in that new artwork, and (c) his company had contracted with a Taiwanese company to create tiny (two inches) painted and pewter fish hat pins based solely on that new artwork. (Wrob Decl. ¶¶_4-13; Exs.1-3.)

Defendants were in full compliance with the Consent Judgment upon its date of entry in the Spring of 1998 and began offering their new fish hat pins later than year. (*Id.* at ¶ 14-17; Ex. 4.) To the best of Mr. Wrob's knowledge, Defendants have never sold any of the disputed fish hat pins since entry of the Consent Judgment. (*Id.*) The only copies they retained were in the files maintained for this Lawsuit.

Defendants' customers are primarily retail stores that sell fishing and hunting equipment. They purchase Defendants' goods at wholesale to resell to consumers at retail. Thus Defendants' catalogues and their website are geared toward retailers. Indeed, most areas of the Defendants' website can be accessed only by wholesale customers, who are required to establish a user name and a password. This is because Defendants' principal customers are retailers, not consumers, and thus the website lists the products at wholesale prices and under conditions relevant only to wholesale customers. This type of password protection is standard in the industry. (Wrob Decl. ¶¶ 18, 22-24.)

Sales of the new version of the fish hat pins began to decline in the early years after 2000. Sometime after 2004 and before 2006, Defendants removed the fish hat pins from their catalogue and placed them on clearance to be sold to retailers at cost, *i.e.*, $0.59/pin. (*Id.* ¶ 19.) Sales in 2010 totaled less than $900. (*Id.* ¶ 21)

Defendants do not sell any products on the eBay website and have no knowledge regarding the eBay materials included in Plaintiff's motion papers. (*Id.* ¶¶ 25-27.)

Defendants dispute all of Plaintiff's factual allegations except for the images on the closeout pages of Defendants' website, which appear to include some images of the prohibited hat pins from Defendants' 1997 catalogue. Although Defendants are still investigating this matter, it appears that the graphic artist who works on the content of that website mistakenly copied images from the 1997 catalog that were still in the computer archives. That graphic artist joined the company years after the Lawsuit was settled. Through no fault of his own he was unaware of the Consent Judgment or the prior controversy over those fish hat pins. Defendants were not aware of this mistaken use of the images until they received a copy of the Motion papers.

Defendants concede and regret this use of the wrong images on a restricted closeout page of their website but urge that it was not intentional and that its impact is de minimis. Sales of all fish pins over the past two years—all at cost—have totaled less than $1,000 per year. (*Id.* ¶¶ 28-32.) As noted above, Defendants' investigation continues.

ARGUMENT

This Court's ability to hold a litigant in civil contempt for alleged violations of its orders arises under two sources of authority: its statutory authority under 18 U.S.C. § 401, *see, e.g., Coleman v. Espy*, 986 F.2d 1184, 1190 (8th Cir.1993) (citing *Shell Oil Co. v. Barco Corp.*, 430 F.2d 998, 1000 (8th Cir.1970)); *see also Taylor v. Finch*, 423 F.2d 1277, 1279 (8th Cir.) ("Courts have power to adjudge persons who willfully disobey their orders to be in contempt and such power extends to both civil and criminal contempt."), *cert. denied*, 400 U.S. 881 (1970); and its inherent authority to enforce compliance with its lawful orders, *see e.g., Spallone v. United States*, 493 U.S. 265, 276 (1990); *see also Baker Elec. v. Otter Tail Power Co.*, 116 F.3d 1207, 1214 n.6 (8th Cir. 1997) (district court retains jurisdiction to ensure effectiveness of continuing order). Regardless of the source for its power, this Court should not exercise it in this case because Mr. Harris has failed to meet the heavy burden required to obtain such relief. *See Independent Federation of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir.1998) ("'contempt power is a most potent weapon, and therefore it must be carefully and precisely employed'") (quoting *Mahers v. Hedgepeth*, 32 F.3d 1273, 1275 (8th Cir.1994)).

"A party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order." *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 505 (8th Cir.2000) (citing *Independent Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir.1998)). In this case, rather than attempting to prove that Defendants violated the Consent Judgment by continuing to sell the pre-1998 pewter pins that were the subject of the Consent Judgment, they attempt to re-litigate the settled copyright infringement case over the copyrightability of designs for tiny fish pins based on real fish. Ultimately Mr. Harris fails to prove either allegation.

I. The Consent Judgment Restricted Sale Of Specific Pins, Not Designs; And Mr. Harris Fails To Prove By Clear And Convincing Evidence That Defendants Have Continued To Sell The Same Pewter Pins That Were The Subject Of The Consent Judgment.

"One of the overarching goals of a court's contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject." *Chicago Truck Drivers*, 207 F.3d at 504 (citing *United States v. United Mine Workers*, 330 U.S. 258, 290 n. 56 (1947)). Yet, that is exactly what Mr. Harris is attempting to do. On pages 3 and 8 of Mr. Harris's Memorandum of Law in Support of his Motion for Contempt (Doc. 33), Mr. Harris modifies the language of the Consent Judgment with the language in bold, below:

> [S]elling, offering for sale, advertising, trading, bartering, disposing, taking orders, placing orders, facilitating the placement or delivery of orders, and/or receiving monetary gain from the sale or transfer of any of the pins shown in Exhibit A, attached hereto, excluding items nos. 121, 122, 317, 318, 520, 521, and 522 on page 1 and including items Q and R on page 2 of Exhibit A **[the "Enjoined Designs"]**.

(Doc. 33 at 3, 8.) Then, rather than arguing that Defendants have continued to sell or distribute the specific enjoined "pins" that were at issue in the Lawsuit and that were the subject of the Consent Judgment, Mr. Harris argues that the "pins" Defendants now sell infringe the "Enjoined Designs." This court never enjoined any wildlife "designs." There was never any admission of liability by Defendants or ruling on Mr. Harris's copyright infringement claims. The Consent Judgment was limited to the specific pins—Defendants' pins—identified in Consent Judgment Exhibit A, not pins based upon the actual fish themselves or upon other versions of those pins similar to the ***copyrightable*** portions, if any, of Plaintiff's fish designs.

Mr. Harris has failed to submit a single sample or picture establishing by clear and convincing evidence that the pins purchased from Defendants are the same pins that Defendants promised not to sell back in 1998. Indeed, Mr. Wrob's declaration proves the opposite: a new artist created new artwork from which new pins were made, and those are the pins that Defendants have been selling since 1998. The Consent Judgment does not reach pins that are similar to Defendants' prior pins that were identified in the Consent Judgment. It only restricts those specifically identified pins. If Mr. Harris wanted a broader restriction, he could have negotiated to have that included in the Consent Judgment as part of the settlement. He did not.

II. Mr. Harris Is Really Alleging A New Copyright Infringement Claim Over Defendants' New, Original Designs For Defendants' Own Line Of Pewter Pins; That Claim Must Fail Because Mr. Harris Cannot Claim A Monopoly Over Ideas, First Expressed By Nature, That Are The Common Heritage Of Humankind.

If Mr. Harris wishes to argue that Defendants have violated Mr. Harris's copyrights in realistic tiny pewter pin designs of fish by making and selling realistic pewter pins of fish that are substantially similar to Mr. Harris's copyrighted designs, then Mr. Harris is asserting new copyright infringement claims and he needs to file a new lawsuit. Yet, even if Mr. Harris were to assert that Defendants' new pins infringe Mr. Harris's old designs, he would fail. Mr. Harris does not own a monopoly on the production and sale of pewter hat pins depicting fish and fishing flies. There are only so many ways a person can render a real fish in pewter on a tiny hat pin, and the law is clear that Mr. Harris cannot use his thin copyright to prevent someone else from designing and selling similar pewter hat pins. "These ideas, first expressed by nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them." *Satava v. Lowry*, 323 F.3d 805, 812-13 (9th Cir. 2003)

As Professor Nimmer explains, the appearance of objects and animals as they occur in nature is not protected by copyright. NIMMER ON COPYRIGHT § 13.03[B][2][6] (1999). So, too, copyright protection does not extend to the ***idea*** of depicting a particular species of fish as a pewter hat pin or "to elements of expression that naturally follow from the idea of such a [depiction]." *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003). As the Ninth Circuit explained in *Satava*, which involved a claim of copyright infringement by an artist who had created a realistic glass-in-glass sculpture of a jellyfish:

> Satava may not prevent others from depicting jellyfish with tendril-like tentacles or rounded bells, because many jellyfish possess those body parts. He may not prevent others from depicting jellyfish in bright colors, because many jellyfish are brightly colored. He may not prevent others from depicting

> jellyfish swimming vertically, because jellyfish swim vertically in nature and often are depicted swimming vertically.

Id. at 811. So, too, Mr. Harris may not prevent others from depicting a particular fish with standard body parts and scale patterns. Again, to quote *Satava*:

> We recognize . . . that the scope of copyright protection in . . . [realistic depictions of live animals] is narrow. *See Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 741 (9th Cir. 1971) ("Any inference of copying based upon similar appearance lost much of its strength because both [works] were lifelike representations of a natural creature."). Nature gives us ideas of animals in their natural surroundings: an eagle with talons extended to snatch a mouse; a grizzly bear clutching a salmon between its teeth; a butterfly emerging from its cocoon; a wolf howling at the full moon; a jellyfish swimming through tropical waters. These ideas, first expressed by nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them.

Id. at 812-13.

So, too, the Third Circuit in *Franklin Mint Corp. v. National Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978), found that the Defendants' realistic painting of male and female cardinal birds on a tree branch did not infringe the plaintiff's realistic painting of male and female cardinal birds on a tree branch, holding that "an artist who produces a rendition with photograph-like clarity and accuracy may be hard pressed to prove unlawful copying by another who uses the same subject matter and the same technique."

When there is essentially only one way to express an idea, the idea and its expression are inseparable and copyright is no bar to copying the expression. In *Hervert Rosenthal Jewelry Corp. v. Kalpakin*, 446 F.2d 738 (9th Cir. 1971), the plaintiff charged defendants with infringing its copyright registration of a pin in the shape of a bee formed of gold encrusted with jewels. The Court held that the idea of "jeweled bee pin" is inseparable from the expression of "jeweled bee pin," and thus copying of the expression is not prohibited. As the Court explained:

> What is basically at stake is the extent of the copyright owner's monopoly—from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an 'idea' that defendants were free to copy.

Id. at 742.

In short, copyright law anticipates that realistic fish pins made of pewter can coexist without unlawful copying. See *George S. Chen Corp v. Cadona International, Inc.*, 266 Fed. Appx. 523 (9th Cir 2008) (affirming summary judgment for defendant against copyright infringement claims brought by holder of copyrights on dolphin, frog, and moon/star wind chime ornaments and stand-alone frog ornament who failed to identify what elements were not commonplace).

We realize the challenge of trying to distinguish differences between small photographs of fish hat pins that are approximately two inches in length. Accordingly, we are prepared to submit to the Court for its examination actual examples of the redesigned fish and fishing-tie hat pins. That examination will eliminate any doubt as to the originality of the new designs.

III. To The Extent That Defendants' Mistaken Use of Images From Its 1997 Catalog On The Closeout Pages Of Its Website Violates The Consent Judgment, That Mistake Was Unintentional and Has Caused No Harm.

There is no physical evidence that Defendants sold any of the prohibited fish pins to Mr. Harris or anyone else after entry of the Consent Judgment. While there is evidence that someone is advertising the prohibited fish pins on eBay, Defendants are not doing so and have no knowledge of who is. Nor have Defendants included images of the discontinued fish pins in any of its printed catalogs or flyers after signing the Consent Judgment.

The ***only*** argument for which Mr. Harris has provided any visual documentation is that the closeouts page of the wholesale customer section of Defendants' website includes photographs of some of the discontinued pins alongside photographs of some of the new pins created from Defendants' specially commissioned original artwork.

To the extent that the appearance of these outdated images in the closeout section of the Defendants' website alongside the newer fish pins violates the Consent Judgment prohibition on "distributing promotional material which displays the" restricted pins identified in that consent decree, Defendants urge that any such violation was unintentional and has caused no harm. Those closeout pages are accessible only to Defendants' wholesale customers and not to the general public.[1] Moreover, sales of those pins totaled less than $900 for the entire year of 2010 and just slightly more than that in 2011—and all sales have been at cost, *i.e.*, without any profit to Defendants.

Defendants are investigating this mistake so that additional information can be provided and the issue can be corrected. With Plaintiff's consent, Defendants are prepared to promptly substitute the corrected images on those two website pages.

WHEREFORE, Defendants pray that this Court enter an Order denying the Motion, allowing Defendants the opportunity to supplement today's submissions within a reasonable time, or for such other and further relief as the Court deems just and proper under the circumstances of this case.

[1]Mr. Harris or his representative apparently convinced one of Defendants' employees to send him a link to the password-protected section of the website, since no one other than wholesale customers has access to those portions of the website. What he viewed is not available to the general public, but only to a far smaller group of retailers.

Respectfully submitted

/s/ *Michael A. Kahn*

Michael A. Kahn (#35411MO)
Geoffrey G. Gerber (#47097MO)
The BrickHouse Law Group
PROFESSIONAL CORPORATION
1006 Olive Street, Ste. 303
St. Louis, Missouri 63101-2048
Tel: (314) 932-1070

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served via the Court's electronic filing system on all counsel of record, this 30th day of September, 2011.

/s/ Michael A. Kahn